Four Years Since the Triggering of Title III of Helms Burton: The Plaintiffs Have Not Done Well

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Tag line: In the more than four years since the expiration of the last presidential suspension of Title III of Helms-Burton, the court interpretations and the passage of time have become a near total bar to Title III claims.

It has been more than four years since the expiration of the last presidential suspension of Title III of the Cuban Liberty and Democratic Solidarity Act – better known as "Helms-Burton" – and so now is an appropriate time to assess the status of litigation commended under Title III's private right of action.

With one major exception, plaintiffs have not done well. Indeed, aside from the Havana Dock Corporation's stunning $400 million-plus combined judgement against four cruise lines, plaintiffs have lost every major judicially resolved case.[1]

Although statutory and constitutional limitations on the federal court's exercise of personal jurisdiction have been an obstacle for plaintiffs (and almost certainly a major deterrent to prospective plaintiffs who opted not to sue), it is the passage of time that has most worked against Title III plaintiffs: The passage of time since the confiscation of their property, which has made it difficult both:

- to adequately allege a defendant's "scienter", which is required to establish that the defendant "trafficked" in the property, as required by the statute; and
- most importantly, limited the persons who "acquired" ownership of a claim to confiscated properties before March 12,1996 and were alive to bring a claim when the suspension expired.

At the time of its adoption, the legislative language limiting Title III's right of action to persons who "acquired" ownership of claim to confiscated properties before March 12, 1996 – which must have seemed innocuous

when the law as drafted in 1996 - has become a near total bar to Title III claims.

Unlike the jurisdictional problems, the plaintiff's bar does not appear to have initially grasped the breadth the courts would give to the term "acquire," and case after case has been dismissed on the pleadings because the plaintiff – who nearly always "acquired" the claim through inheritance after 1996 – cannot allege ownership of it prior to March 1996.

The specifics of these pleading obstacles, along with several other issues on which the courts have now passed are described below.

The Legal Terrain – Helms-Burton

President Clinton signed Helms-Burton into law on March 12, 1996.[2] The legislation reflects an effort to increase pressure on the Cuban government in the wake of the Soviet Union's collapse and corresponding economic uncertainty on the island. In addition to codifying the United States' existing trade embargo against Cuba,[3] Congress targeted foreign private businesses that might invest in the county. Title IV of Helms-Burton bars individuals from entering the United States who have economic ties to property expropriated from U.S. nationals, and Title III provides a private right of action[4] against such individuals and business organizations.

But, perhaps in response to separation-of-powers concerns, Congress delegated authority to the President to suspend the right of action under Title III in six-month intervals. President Clinton did just that upon the effective date of Title III, and every president has done the same since then until President Trump's decision in April 2019 to allow it to take effect.

Title III: The Private Right of Action

The private right of action created by Title III is broad. Broken-down, the claim has five elements:

- (1) Any person that, *after a certain date in 1996*;
- (2) *traffics;*
- (3) *in property which was confiscated by the Cuban government on or after January 1, 1959*;
- (4) shall be liable to any *United States national;*
- (5) *who owns a claim to such property*.

As for potential defendants, the term *"person"* is broadly defined as "any person or entity, *including* any agency or instrumentality of a foreign state".

The liability-generating conduct is also broadly defined. For the purposes of Title III, a person *"traffics"* in confiscated property if that person *knowingly and intentionally* –

- (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property;
- (ii) engages in a commercial activity using or otherwise benefiting from confiscated property;
- (iii) causes, directs, *participates in, or profits from, trafficking* (as described in clause (i) or (ii) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

The term "traffics" has an important carve out, however. "Traffics" does *not* include "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel."

Furthermore, under a subsection headed *"Applicability*," the right of action is limited in most instances to plaintiffs who "acquired" claims prior to March 1996. Specifically, the provision reads: "In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996."

As noted above, this limitation must have seemed minor when Congress passed the law in 1996, but 27 years later it is an insurmountable obstacle to most prospective Title III plaintiffs.

Jurisdiction

Helms-Burton does not exist in a vacuum. Rather, the operation of the Title III in the United States Courts remains subject to the United States Constitution and the interplay of other statutes, both federal and state. Although Title III creates federal ***subject matter*** jurisdiction over cases brought thereunder, it does nothing to affect the rules of ***personal jurisdiction***, which are set by the Constitution and the statutory law of the states in which the courts sit.

Under the Due Process Clause of the U.S. Constitution, domestic courts exercise only limited personal jurisdiction. The dispute must have a connection to the state in which the court sits, or the defendant must be "at home" in that state. Recent Supreme Court case law has made it clear that simply doing sustained business or having a subsidiary headquartered in a state does not make a defendant at home there.[5] State law may further narrow the basis for personal jurisdiction over out-of-state plaintiffs, delineating the types of in-state contacts required to confer jurisdiction.

Similarly, the court's subject matter jurisdiction over congressionally created rights of action – like that under Title III – is limited by the constitutional requirement that all matters before the federal courts concern a "case or controversy."[6]

Finally, the Foreign Sovereign Immunities Act ("FSIA") limits the subject matter jurisdiction of U.S. courts over agencies and instrumentalities of foreign states in certain circumstances.[7] The interplay of Title III's express creation of a right of action against such entities with FSIA's limitations was an open question at the time of the last presidential suspension's expiration.

The Cases - Jurisdiction

Personal Jurisdiction in the Case Law

As predicted by some commentators,[8] personal jurisdiction has proved difficult for some plaintiffs to establish. The U.S. trade embargo essentially guarantees that all core "traffickers" in confiscated property are based abroad, and the cases reveal that the more direct the trafficking, the more difficult it is to establish personal jurisdiction.

Take for example the case of *Herederos de Roberto Gomez Cabrera, LLC v. Teck Resources Limited*.[9] There, the plaintiff – a holding company for the shares of Rocoga Minera, S.A., which had been inherited by the children of Rocoga's late owner – sued a Canadian mining company for partnering with the Cuban state-owned mining company, Geominers S.A., to extract minerals from mines confiscated from Rocoga.[10] The allegations, if true, are textbook trafficking. But the defendant, Teck, is not a U.S. company, and its activities in Cuba had nothing to do with its connections to the United States – which are several subsidiaries in Washington State and a mine in Alaska.[11] The court had little trouble dismissing the case for lack of personal jurisdiction.[12]

Cases where the defendants are alleged to be actually operating the confiscated property are a minority in the federal courts' Title III docket. Far more common are cases where the defendants are alleged to participate in, or profit from the trafficking through some tangential activity – like using a

port or brokering a hotel reservation. The reason why the core traffickers in cases like these are left out of the complaint may be because plaintiffs' lawyers have (correctly) concluded that there is no basis for personal jurisdiction over them.

Subject Matter Jurisdiction in the Case Law

Standing. As noted above, federal judicial power is limited by the Constitution to actual "cases" and "controversies" – which, in part, means that the plaintiff must have suffered harm that is traceable to the defendant's conduct, and which is susceptible to remedy by the court.[13] This doctrine is known as "Article III standing" or "Constitutional standing."

In multiple cases, defendants have argued that Title III plaintiffs lack constitutional standing. Generally speaking, these defendants have characterized plaintiffs' injuries as being for the loss of the property underlying their claims, and argued that this type of injury is not traceable to the defendants' conduct – even if such conduct were to constitute trafficking for purposes of the statute – because the injury was caused by the Cuban government's confiscation of the property, not from defendant's subsequent use of, or profit from, the property. In the same vein, these defendants have argued that this type of injury cannot be remedied by the court because, even if the plaintiffs obtain judgments against the defendants, the properties will remain in the hands of the Cuban state.

These arguments imply that Title III's private right action is almost entirely unconstitutional because only lawsuits against the Cuban state itself – the sole party responsible for confiscation – could survive scrutiny.

Courts have not been persuaded. In a decision on motions to dismiss a pair of consolidated cases, *Glen v. Trip Advisor LLC et al.*[14] and *Glen v. Visa, Inc. et al.*,[15] a judge in the U.S. District Court for the District of Delaware rejected the defendants' injury-through-confiscation standing argument, concluding that trafficking gives rise to a different type of injury; one akin to the harm that supports claims for unjust enrichment at common law.[16] The court drew on Supreme Court precedent that makes clear that, for purposes of constitutional standing, injuries do not need to be tangible – *e.g.* the loss of the property itself – if such injuries are similar to harm that has traditionally been recognized as a basis for lawsuit in England or the United States and Congress has expressed an intent to make such injuries redressable.[17] Once the injury was properly framed as emanating from the supposedly unjust enrichment derived from the alleged trafficking of the properties – not the confiscation of them itself – then the court deemed it traceable to the defendants' conduct and redressable through Title III.[18]

Other cases have adopted the same reasoning. In all, decisions from three of the twelve territorial federal circuit courts of appeal, combined with analogous district court decisions in at least two other circuits,[19] mean that constitutional standing is not a viable defense to a Title III action. The case law on this issue serves as the lone doctrinal bright spot for Title III plaintiffs.

Foreign Sovereign Immunities Act. An interesting jurisdictional question of Helms-Burton jurisprudence has emerged from the interplay between Title III and the FSIA. As noted above, Helms-Burton includes agencies and instrumentalities of a foreign state among the "persons" who may be liable under Title III. Generally speaking, however, the agencies and instrumentalities of foreign states are immune from jurisdiction in the United States pursuant to FSIA unless the claims against them fall into one of several enumerated exceptions.[20]

The question of which statutory regime controls – the apparently wholesale private right of action conferred by Helms-Burton, or presumptive immunity conferred by FSIA – was presented in *Exxon Mobile Corporation v. Corporación CIMEX S.A. et al. T*he plaintiff Exxon sued two Cuban government-owned entities (and the alleged alter-ego of one of them) that Exxon claims operate gas stations and oil refineries confiscated from a former Exxon subsidiary.[21] Exxon argued that Helms-Burton abrogated FSIA's immunity for the Title III defendants.[22] Exxon relied on language in Helms-Burton giving precedence to Title III in any conflicts with the provisions of Title 28 of the U.S. Code (which cover procedure in the federal courts, and among which FSIA is found) to argue that Title III's right of action trumped FSIA's immunity.

The court disagreed. Drawing on case law that distinguishes a right of action for subject matter jurisdiction, the court determined that there was no conflict between the statutes.[23] For the court, one statute (FSIA) determines who may be sued in federal court, while another (Helms-Burton) controls whether there is a basis for such a suit. Having determined that FSIA applies, the court proceeded to analyze the application FSIA's exemptions to Exxon's claims, determining that Exxon had successfully pled that one defendant's alleged trafficking fell within an exemption, but that it failed to plead around immunity for the other two defendants, however, finding that jurisdictional discovery was warranted.

Exxon has appealed the court's decision that Title III does not independently confer subject matter jurisdiction over the defendants, and defendants have appealed the court's decision that one of Exxon's claims falls within a FSIA exemption and that Exxon is entitled to jurisdictional discovery with respect to its other claims.[24]

The Cases - Problems with the Merits

In addition to problems establishing personal jurisdiction, plaintiffs in Title III cases have struggled to adequately plead the elements of the of claim under the statute.

Acquired Before March 12, 1996

Under Section 6082(a)(4)(B), for Title III claims based on confiscations of property before Helms-Burton was signed into law on March 12, 1996, the plaintiff must have "acquired" the claim prior to March 12, 1996. Searching for the intent behind any Congressional act is a speculative exercise, and some jurists have questioned whether a single purpose can be ever determined given that legislating is an inherently group exercise.[25]

That said, it seems likely that Congress was concerned about the development of a claims-trading market for Title III claims following the passage of Helms-Burton. Legislative history supports this thesis. The House Conference Report, for example, stated that this provision was "intended, in part, to eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section."[26]

Whatever its intent, however, Congress used the broad term "acquire" to limit the applicability of the right of action. Such a reading of the term is nearly compelled when the next provision of the "Applicability" subsection is considered. Section 6082(a)(4)(*C*) provides: "In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, acquires ownership of a claim to the property by assignment for value, may not bring an action on the claim under this section."

When Congress enacted Helms-Burton, the interpretation of "acquired" in Subsection (a)(4)(B) did not appear to have much significance. On March 12, 1996, and in the immediate months thereafter, there was little opportunity for claims to change hands by means other than purchase. But, over the course of the 23 years that the Title III right of action remained suspended, a large number of claimants – the majority of whom, after all, were old enough to have owned property in Cuba in the early 1960s – died and passed down their Title III claims to their younger relatives.

Courts have uniformly ruled that these, second generation, claimants are barred by Subsection 6082(a)(4)(B) from asserting claims under Title III. The most complete analysis is the concurring opinion of the Eleventh

Circuit's decision in the consolidated appeal of *Bengochea v. Carnival Corporation* and *Bengochea v. Royal Caribbean Cruises, Ltd.*

In *Bengochea*, the defendant cruise lines adduced undisputed evidence that the plaintiff had inherited in 2000 shares of a company that he alleged owned certain waterfront property in Santiago de Cuba, which he alleged the cruise lines had used. The district court granted the defendants' motion for judgment on the pleadings, and the plaintiff appealed arguing that the term "acquired" in Subsection (a)(4)(B) is limited to purchases.

The Eleventh Circuit affirmed the district court's decision. The majority opinion noted that every court to consider the question had likewise determined that the term "acquired" includes receipt through inheritance.

As noted, when the Eleventh Circuit decided *Bengochea* in November 2022, every court to consider this issue had decided it the same way. And since *Bengochea*, the trend has continued.

With the U.S. courts of appeal for two circuits and every district court to consider the issue having rejected plaintiffs' efforts to exclude transfers via inheritance from the scope of Section 6082(a)(4)(B)'s bar on post-1996 "acquired" claims, the law seems settled. Only the plaintiffs who have owned claims to confiscated property since before March 12, 1996, can sue under Title III.

This rule limits the universe of prospective plaintiffs to three relatively narrow groups.

- The *first*, and smallest, group consists of individuals who owned confiscated property at the time of confiscation and are still alive. Given that most confiscations occurred over sixty years ago, the youngest members of this group would be in their eighties.

- The *second* group of prospective plaintiffs are individuals who inherited claims to confiscated properties before March 12, 1996. There are reasons to suspect that this group too is fairly small. To begin with, prior to the passage of Helms Burton, there was no mechanism for Cuban emigres (as opposed to U.S. citizens at the time of confiscation, who had access to the Foreign Claims Settlement Commission ("FCSC")) to recover damages in the United States, and so there would have been little incentive to bequeath an interest in confiscated properties to heirs. Moreover, many of the heirs who inherited Title III claims prior to 1996 are likely themselves now growing old, and of course cannot pass down or assign away the claims.

- The *third* group of prospective plaintiffs are juridical entities, such as corporations, which can theoretically "live" forever under the laws of the government by which they are organized. This group is also relatively small. While many of the confiscated properties may have been owned by Cuban *sociedades anonimas* ("S.A.s") at the time of the Cuban Revolution, there is no indication that any of these companies were reincorporated in the United States. Rather, since only "United States nationals" have claims under Title III, claims based on properties owned by Cuban companies typically have been advanced by the now U.S.-nationalized individuals who owned shares in the Cuban companies – or the heirs to such shares.[27] As natural persons, these types of plaintiffs have the same problems navigating the "acquisition" bar date discussed above. The lack of juridical entities with claims based on Cuban ownership of confiscated properties leaves the owners of claims based on the confiscation of U.S. company-owned property as apparently the sole members of the third group of prospective plaintiffs.

United States National

As discussed above, Title III's right of action is limited to "United States nationals." The requirement that plaintiffs bringing Title III claims be U.S. nationals is straight forward and has generally not given rise to litigation.[28] Less clear is whether the U.S. national requirement extends back to the acquisition of a claim, or even to pre-revolutionary ownership of the confiscated property. One court took the position that the plaintiff would have had to be a U.S national in 1989 when he inherited his father's shares of a Cuban company he alleged owned the Havana airport.[29] The decision is on appeal in the Eleventh Circuit,[30] and so appellate guidance on the issue is expected soon.

Scienter

The term "scienter" is typically used in the law to mean knowledge of the nature of one's act or omission. In the context of Title III, it is used for the part of the definition of "traffics" that limits that term to "knowing and intentional" conduct.

As a general matter, U.S. courts are relatively lenient about the degree of specificity with which plaintiffs must allege scienter because facts pertaining to a defendant's state of mind are seldom within the control of the plaintiff. That said, in federal court, there is a minimum pleading standard, requiring a plaintiff to at least provide enough facts to *infer* a defendant's scienter. Courts have held that pre-filing plaintiff cease and desist notice sent to defendants in advance of lawsuits are sufficient to satisfy the trafficking scienter element.[31]

The problem for plaintiffs is that their Title III claims only become actionable if the defendant continues to use, profit, or otherwise benefit from the confiscated property after receiving the notice. Since defendants tend to cease activities related to confiscated properties after receiving notice, pleading trafficking in these instances has proved difficult,[32] leaving plaintiffs in a Catch 22 – unable to plead scienter for pre-notice trafficking and unable to plead trafficking post notice.

Claims and Trafficking

Finally, there have been cases where the nature of the defendant's interaction with the confiscated property or the plaintiff's rights to the property are too vague (or too, simply, wrong) to survive a motion to dismiss or summary judgment. In one case all the plaintiffs could allege was that BNP Paribas delivered cash to Banco Nacional de Cuba's offices in Switzerland.[33] For the court, the alleged commercial activity was too indefinite to plead trafficking. The court noted that the complaint did "not include any facts concerning the amount of currency provided; the frequency of the deliveries; or, most significantly, what, if anything, BNC did with the currency and whether BNC gave anything to Paribas in exchange for it."

Similarly, in a case brought by the sole surviving sibling of a group that once owned a concession to operate maritime facilities in the Mariel Bay, the court in *de Fernandez v. Seaboard Marine, Ltd.* concluded on summary judgment that the geographic scope of the plaintiff's concession – in which the defendant was allegedly trafficking – was not the entirety of Mariel Bay, but rather only the east side of the bay. [34] Because the defendant's commercial activities were only alleged to occur on west side of the bay, the Court entered summary judgment in favor of the defendant.[35]

The Havana Docks Cases

Finally, there is the one set of cases in which a plaintiff has prevailed so far – the so called, *Havana Docks* cases. These are a set of four cases against four cruise lines brought by the U.S. company that owned a concession to operate three piers in the Port of Havana. The case has featured multiple issues discussed above, including litigation over what it means for a company to be a "U.S. National;" the scope of the property interest represented by ownership of a "claim" to a governmental concession; the lawful travel exemption to the definition of trafficking; and the facts needed to establish a defendant acted with scienter where the plaintiff's claim has been certified by the FCSC.

As discussed below, the district court concluded that their evidence entitled the plaintiff concessionaire to judgment as a matter of law on all of these

issues and awarded it more than $110 million from each of the four cruise lines that it sued. An appeal is pending.

The Facts. In 1960, the Havana Docks Corporation was a U.S. company in possession of a 99-year concession to operate three large piers in the Port of Havana.[36] The concession ran from 1905, when a predecessor version of it was issued, through 2004. Havana Docks' operations were nationalized by the Cuban government and, in 1967, the company filed a claim with the FCSC. In 1971, the FCSC validated the claim and determined that the Cuban government owed Havana Docks around $9 million, plus interest from the time of the confiscation.

Decades later, in 2015, after the enactment of Helms Burton but while Title III remained suspended, the U.S. government – which has restricted travel to Cuba under the Trading the Enemy Act since 1963 – changed its license for so-called "people-to-people" educational travel to Cuba from a specific license (*i.e.*, case-by-case) to a general license. It also granted a general license to four cruise lines to transport people from the United States to Cuba. Shortly thereafter, a number of cruise lines began offering travel to Cuba for people who self-certified that they qualified for the general people-to-people travel license. Most of these cruises included calls in Havana.

There, the cruise lines docked their ships at the piers that were once subject to Havana Docks' concession. To facilitate their passengers' compliance with the requirements of the general people-to-people travel license, the cruise lines provided shore excursions intended to include educational activities needed for the license.

The Case. When the cruise lines began to dock at the piers which were previously operated by Havana Docks, Havana Docks, which had continued to exist as an active corporation in the United States – albeit without any commercial operations – sent letters to the U.S. government requesting that the cruise lines and their officers and directors be penalized for various alleged violations of regulations on travel to Cuba, but the government declined to take any action.

Havana Docks also sent letters to the cruise lines accusing them of trafficking in the piers for the purposes of Title III and demanding that they cease and desist from docking at the piers.

After the suspension of Title III expired, Havana Docks sued Carnival Cruise Lines. After Carnival's motion to dismiss was denied, it sued three other cruise lines: Royal Caribbean Cruises, Norwegian Cruise Line, and MSC Cruises.[37]The court ultimately, denied the defendants' motions to dismiss the complaints and consolidated the cases for discovery and the parties' cross motions for summary judgment.

As a corporation with theoretically perpetual existence, Havana Docks did not a have a problem with the March 12, 1996, acquisition bar because it was the owner of the claim to confiscated property at the time of confiscation. Rather, Havana Docks struggled with a different eligibility problem. The company's sole shareholder and president, who is also one of its two directors, lives in London.

Under Helms-Burton, the nationality of a company depends on the location of its principal place of business, which in turn depends on the location of its "nerve center." Since Title III's right of action is limited to U.S. Nationals, the defendants argued that Havana Docks was not a U.S. company based on evidence that its London-based president made the company's important decisions. Havana Docks countered that the day-to-day administrative functions of the company's secretary and other director in Kentucky should control, along with the fact that company's address was there, albeit at a bank where the other director was employed.

The court sided with the Havana Docks, concluding that the evidence of a U.S.-based nerve center was so strong that no reasonable jury could find that the company was run from abroad. The defendants have appealed, arguing that that evidence is at least ambiguous enough as to require a jury trial.

Another case-specific issue in *Havana Docks* concerns the scope of property interest represented by the plaintiff's claim. As noted, Havana Docks did not own the piers in fee simple. The piers always belonged to the Cuban government, but Havana Docks had a concession to use the piers for commercial activity until 2004. The cruise line defendants argued that, since the concession would have expired by its own terms in 2004 had it not been "confiscated" – or, as more typically termed, "cancelled" – by Cuba in 1960, Havana Docks no longer owns a claim to any existing property.[38]

At one point, the court in *Havana Docks* agreed with the defendants, dismissing the complaints against MSC and Norwegian,[39] but then reversed itself.[40] The court reasoned that the confiscation of property terminated property interests as a general matter, and so, if the scope of a plaintiff's property interest were assessed from the time of the trafficking, no claim would be viable under Title III.[41] The defendants have appealed this aspect of the court's rulings as well, arguing that the court's interpretation of the statute vests plaintiffs with new and perpetual property rights beyond those actually owned in Cuba at the time of confiscation.[42]

The parties in *Havana Docks* also disputed whether the evidence conclusively established the defendants' scienter. The issue was essentially another front for litigating the import of the time-limited nature of the concession. Havana

Docks argued that uncontroverted evidence of the defendants' knowledge of the FCSC certified claim against Cuba for damages from cancellation of the concession was all that it needed to show knowing and intentional trafficking – *i.e.*, knowledge that an interest in the piers was confiscated and from whom – whereas the defendants contended that there would need to be evidence that they knew that Havana Docks's interest in the piers would continue past the 2004 expiration of the concession.[43] The court rejected the defendants' argument on the same basis that it rejected their direct challenge to Havana Docks' ongoing property interest in the piers.

The defendants have appealed, also challenging the court's rejection of their argument that the plaintiff would need to show they knew Havana Docks was a U.S. national – another separately disputed fact.[44]

Finally, the court rejected that defendants' argument that their use of the piers qualified for the lawful-travel exception to trafficking. It will be recalled that conduct that is "incidental" to lawful travel, and "necessary" to the conduct of such travel is exempted from the definition of "trafficking" in Helms-Burton. The defendants argued that their transport of passengers who self-certified that they qualified for U.S. government's general license for people-to-people travel to Cuba, along their qualification for the general license for passenger sea service, immunized them from liability for trafficking.[45] The court disagreed.

It ruled *first* that –although the passengers self-certified that they were eligible for the people-to-people travel license – most passengers did not actually qualify for a travel license because evidence suggested that their experience in Cuba was primarily touristic, not educational.

Second, the court concluded that even if the passenger travel facilitated by the cruise line defendants was lawful, use of the piers was not necessary since the people-to-people travel did not require disembarking at the Havana port.

The defendants have appealed, stressing separation-of-powers concerns about the court's re-examination of a decision with the purview of a federal agency.[46] They also argue that the term "necessary" as used in the exemption applies to the specific lawful travel – in this instance, a cruise shore excursion to Old Havana – not to travel to Cuba generally.

Conclusion

The success (for now) of Havana Docks with its claims against the cruise lines is the exception that proves the rule of how difficult Title III actions

have become for most plaintiffs. The *Havana Docks* cases presented several opportunities not usually available for plaintiffs. First, unlike the owners of most claims to confiscated property, Havana Docks is a corporation in continual existence since the time of confiscation. Second, because they believed that their Cuban activities were legally blessed by the U.S. government, the defendant cruise lines openly used the piers, and did so directly in connection with their U.S. based activities.

As discussed above, these factors are rare. Very few pre-1996 original owners of claims to confiscated property are still alive or in existence, and few companies or individuals using confiscated properties are U.S.-based or allow their Cuban activities to have contact the United States. These dynamics, along with other difficulties such as problems establishing defendants' scienter and connecting the scope of decades-old property interests to current commercial activities, have made recoveries under Title III nearly impossible for plaintiffs thus far.

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[1] This analysis does not purport to be an exhaustive survey of Title III litigation, but significant research reveals only one plaintiff – Havana Docks – has received a favorable judgment. Several notable cases remain pending, however.

[2] Congress.Gov, Actions Overview H.R.927 — 104th Congress (1995-1996), https://www.congress.gov/bill/104th-congress/house-bill/927/actions.

[3] *See* 22 U.S.C. § 6032.

[4] A law that includes a "private right of action" authorizes individuals to enforce a right under the law against others through the courts.

[5] *See* Daimler AG v. Bauman, 571 U.S. 117 (2014).

[6] *See* U.S. Const. art. III § 2, cl. 1.

[7] *See* 28 U.S.C. § 1602 et seq.

[8] Peter Fox, *Will Putting Title III of Helms-Burton into Effect Open the Litigation Floodgates?*, Colum. L. Sch. Bluesky Blog (May14, 2019), http://clsbluesky.law. columbia.edu/2019/05/14/will-putting-title-iii-of-helms-burton-into-effect-open-the-litigationfloodgates/.

[9] No. 20-CV-21630 (S.D. Fla.).

[10] *See* Am. Compl. (Dkt. No. 7), 20-CV-21630 (S.D. Fla. July 8, 2020).

[11] 535 F.Supp.3d 1299 (S.D. Fla. 2021).

[12] *Id.*, *aff'd* 43 F.4th 1303 (11th Cir. 2022).

[13] *See Lujan v. Nat'l Wildlife Feder'n*, 497 U.S. 871 (1992).

[14] No. 19-CV-1809 (D. Del.)

[15] No. 19-CV-1870 (D. Del.)

[16] 529 F.Supp.3d 316 (D. Del. 2021).

[17] *Id.* at 326-27.

[18] *Id.* at 327-28. The court nevertheless dismissed Mr. Glen's complaints because he acquired his claim to the confiscated property after March 12, 1996. *See id.* at 328-31.

[19] *See, e.g.*, *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, 534 F.Supp.3d 1, 30-32 (D.D.C. 2021); *Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc. v. Société Générale, S.A.*, 577 F.Supp.3d 295, 307-10 (S.D.N.Y. 2021)

[20] *See* 28 U.S.C. § 1602 et seq.

[21] Am. Compl. (Dkt. No. 33), No. 19-CV-1277 (D.D.C. Mar. 6, 2020).

[22] 534 F.Supp.3d 1, 11 (D.D.C. 2021).

[23] *See id.* at 11-14. The court also used a variety of canons of statutory interpretation to conclude that Congress did not intend for Title III to abrogate FSIA. *See id.*

[24] No. 22-7019 (D.C. Cir.).

[25] Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 863-67 (1992).

[26] *Garcia-Bengochea v. Carnival Corp.*, 57 F.4th 916, 936 (11th Cir. 2023) (Jordan, J., concurring) (quoting H.R. Conf. Rep. 104-468 at 59 (March 1, 1996)).

[27] *See, e.g.*, Second Am. Compl. (Dkt. No. 208), *Rodriguez v. Imperial Brands,* No. 20-CV-23287 (S.D. Fla. Mar. 9, 2022); Second Am. Compl. (Dkt. No. 67), *Moreira v. Société Général*, 20-CV-9380 (S.D.N.Y. Feb. 4, 2022); Second Am. Compl. (Dkt. No. 82), *Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc. v. Société Générale, S.A.*, 20-CV-851 (S.D.N.Y. Sept. 11, 2020); Am. Compl. (Dkt. No. 7), *Herederos de Roberto Gomez Cabrera, LLC v. Teck Resources Ltd*, 20-CV-21630 (S.D. Fla. July 8, 2020); Am. Compl. (Dkt. No. 22), *Iglesias v. Pernod Ricard, PSA*, No. 20-CV-20157 (S.D. Fla. Apr. 6, 2020); Compl. (Dkt. No. 1), *Garcia-Bengochea v. Carnival Corp.*, 19-CV-21725 (S.D. Fla. May 5, 2019)

[28] The exception is the *Havana Docks* cases discussed below where, on unusual facts, the parties disputed the current nationality of the plaintiff corporation.

[29] No. 19-CV-23965, 2022 WL 2352414 (S.D. Fla. June 30, 2022).

[30] No. 23-12568 (11th Cir.)

[31] *See Id.; Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc. v. Société Générale, S.A.,* 577 F.Supp.3d 295, 312-14 (S.D.N.Y. 2021).

[32] *See id.* (allegations in second amended complaint of post-notice trafficking too vague); *Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc. v. Société Générale, S.A.*, No. 20-cv-851, 2023 WL 2712505, at *3-*5 (S.D.N.Y. March 30, 2023) (allegations in third amended complaint of post-notice trafficking still too vague and conclusory).

[33] No. 20-CV-9380, 2023 WL 2051169, at *1 (S.D.N.Y. Feb. 16, 2023).

[34] No. 20-CV-25176, 2022 WL 3577078, at *11-*12 (S.D. Fla. Aug. 19, 2022). Claims by heirs to the deceased siblings were dismissed in an earlier decision because they acquired the claims after 1996. *See* No. 20-CV-25176, 2021 WL 3173213, at *8-*9 (S.D. Fla. July 27, 2021).

[35] No. 20-CV-25176, 2022 WL 3577078, at *16 (S.D. Fla. Aug. 19, 2022).

[36] 592 F.Supp.3d 1088, 1121 (S.D. Fla. 2022).

[37] No. 19-CV-23588 (S.D. Fla.), 19-CV-23590 (S.D. Fla.) & No.19-CV-23591 (S.D. Fla.).

[38] 592 F.Supp.3d 1088, 1117 (S.D. Fla. 2022).

[39] *See Havana Docks Corp. v. Norwegian Cruise Lines Holdings LTD*, 431 F.Supp.3d 1375 (S.D. Fla. 2020).

[40] *See Havana Docks Corp. v. Norwegian Cruise Lines Holdings LTD*, 455 F.Supp.3d 1355 (S.D. Fla. 2020).

[41] *Havana Docks Corp. v. Royal Caribbean Cruises, Ltd.*, No. 19-CV-23590, 2020 WL 1905219, at *8 (S.D. Fla. Apr. 17, 2020).

[42] Appellants' Br. (Dkt. No. 80), at 35-44, No. 23-10171 (11th Cir. June 30, 2023).

[43] 592 F.Supp.3d 1088, 1157 (S.D. Fla. 2022).

[44] Appellants' Br. (Dkt. No. 80), at 69-75, No. 23-10171 (11th Cir. June 30, 2023).

[45] 592 F.Supp.3d 1088, 1170-71 (S.D. Fla. 2022).

[46] Appellants' Br. (Dkt. No. 80), at 47-59, No. 23-10171 (11th Cir. June 30, 2023).